Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-7351

ROBERTO GARZA-GARCIA, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI

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IN THE

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NO. _____

ROBERTO GARZA-GARCIA, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI

To The Supreme Court Of The United States:

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in the above cause entered on October 4, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals is printed in Appendix A, Page 1. The order denying the petition for rehearing is printed in Appendix A, Page 3.

JURISDICTION

The judgment of the Court of Appeals was entered on October 4, 1976. Rehearing was denied on November 1,

1976. The jurisdiction of this Court is invoked under 28 U.S.C.A. Sect. 1254(1).

QUESTIONS PRESENTED

1. Whether the Petitioner can be convicted on the same facts and evidence he has already been found not guilty of in the same indictment?
2. Whether the Government can offer contraband evidence without showing the chain of custody?

STATUTES INVOLVED

United States Constitution, Fifth Amendment.

STATEMENT OF THE CASE

COMES NOW the Appellant, ROBERTO GARZA-GARCIA, and respectfully files this his Brief on Appeal. The Appellant was originally indicted on six separate and distinct counts alleging violations of Title 21, United States Code, Sections 963 and 952-A. The Appellant was acquitted on Count 1 of the Indictment and the Court entered an Order of dismissal on January 20, 1976 on Counts 2 and 3 of the Indictment. The Appellant was tried before a jury and found guilty on Counts 4, 5 and 6 and he received a sentence, the maximum sentence imposed by law, to-wit:

> Fifteen years on each count to run consecutively for an aggregate sentence of forty-five years.

This Appeal is prosecuted to protect and preserve the right of the Appellant and further to present the Court the legal issues which require that this cause be reversed.

REASONS FOR GRANTING THE WRIT

It is the Government's burden and responsibility to establish continuous care, custody and control of the Exhibits at all times material to the case. This proof of care, custody and control of specific exhibits precludes the possibility of substitution of evidence, change of character of the evidence or mis-identifying a particular exhibit. The United States of America has failed to show by competent evidence a continuous chain of custody from Brownsville, Texas to the laboratory in Dallas, Texas and back. The missing link and the proof that these exhibits were in truth the same ones which were sent to the laboratory by the Agents is the failure of the Government to produce the evidence custodian whomsoever that might be.

It has long been established by the Federal Courts in this country that the Government is required to establish the continuous chain of custody of seized articles by persons who are primarily responsible for their possession and control and that they are not required to bring every single person who may have had technical possession of the items, *Gallego v. United States,* 276 F.2d 914, (9th Cir. 1960).

Each judicial circuit has established the criteria for continuous possession, control and custody. *Smith v. United States,* 157 F.2d 705, 81 U.S. App. D.C. 296, even to the extent that the item was in the same condition when offered as it was at the time it was seized. *United States v. S. & B. Penick & Co.,* 136 F.2d 413 (2nd Cir. 1943).

It is within the sound discretion of the trial court to determine the proper chain of custody by the prosecution.

18 U.S.C.A., Sec. 545, Comprehensive Drug Abuse Prevention and Control Act of 1970, Sec. 401(a) (1), 1002 (a), 1013, 21 U.S.C.A., Sec. 841(a) (1), 952(a), 963, *United States v. Bates,* (5th Cir. 1975), 512 F.2d 56.

The Indictment in this case (R. 1 through 5) charged in Count 1 a conspiracy beginning on or about January 13, 1975, including on or about November 11, 1975, purportedly to distribute a quantity of cocaine. Count 5 alleged a conspiracy beginning on November 10, 1975 and concluding on November 11, 1975 (R. 4) which was alleged to be an agreement to unlawfully import a quantity of cocaine into the United States. The Jury found the Appellant not guilty on Count 1 and the Court entered its verdict thereon. (R. 23).

The following overt acts are the same identical overt acts as found in Count 1, overt acts six through eleven and in Count 5, overt acts one through six.

OVERT ACTS

1. On or about November 10, 1975, ROBERTO GARZA-GARCIA and Special Agent of the Drug Enforcement Administration, Donald R. Perry had a telephone conversation.
2. On or about November 11, 1975, at approximately 4:55 p.m., ROBERTO GARZA-GARCIA, JUAN GARZA ROCHA and Special Agents, Donald R. Perry and Robert Parsons of the Drug Enforcement Administration met in Room 227 of the Holiday Inn, Brownsville, Texas.
3. On or about November 11, 1975, at approximately 5:28 p.m., ROBERTO GARZA-GARCIA and

Robert Parsons, Special Agent of the Drug Enforcement Administration drove in a blue and white 1975 Chevrolet pickup truck, Texas License DT-2937, to 1424 Los Ebanos Street, Brownsville, Texas.

4. On or about November 11, 1975, at approximately 5:33 p.m., FRANCISCO SALINAS RIVAS and NORBERTO CAMARILLO CASAS departed 1424 Los Ebanos Street, Brownsville, Texas, in a Mexicali red 1975 Ford pickup truck with 1975 Texas License DS-2430 and drove into Matamoros, Tamaulipas, Mexico, via the Gateway International Bridge.
5. On November 11, 1975, at approximately 6:15 p.m., FRANCISCO SALINAS RIVAS and NORBERTO CAMARILLO CASAS entered the United States from the Republic of Mexico in the red 1975 Ford pickup, bearing 1975 Texas license DS-2430 and drove to 1424 Los Ebanos Street, Brownsville, Texas.
6. On November 11, 1975, at approximately 6:30 p.m., ROBERTO GARZA-GARCIA, FRANCISCO SALINAS RIVAS, NORBERTO CAMARILLO CASAS, and Special Agent of the Drug Enforcement Administration Robert Parsons met at 1424 Los Ebanos Street, Brownsville, Texas.

The alleged conspiracies both purportedly took place in the Brownsville Division for the Southern District, both purportedly involved cocaine and both purportedly involved the Appellant. The Jury found the Appellant not guilty on Count 1 of the Indictment and then by its

verdict found that the Government failed to provide any overt acts of the Appellant which would effectuate the conspiracy or that the Government failed to prove the existence of a conspiracy of itself. In the verdict of the finding of Count 1 as not guilty, there is a conflict of the verdict between Count 1 and Count 5. If Appellant is covered with regard to the law of jeopardy, res-judicata and estoppel, then the Government could not convict on Count 5 because there would be no overt acts in existence as a matter of fact to carry out the alleged agreement. Further, Count 5 is a mere carving out of the same facts alleged in Count 1 covering the same dates and times. If there was a conspiracy there was only one conspiracy and therefore Count I would control and therefore require the court to enter judgment of not guilty on Count 5 as requested in the Motion for New Trial. (R. 18)

The proof showed a course of conduct, a single impulse, a single decision, a course of conduct, as distinguished from a series of separate transactions. Consequently, the Defendant should have been sentenced, if he violated the law, for only one offense. In Re: *Snow*, 1887, 12 U.S. 274, 7 S. Ct. 556; *United States v. Universal C.I.T. Corp.*, 1952, 344 U.S. 218, 73 S. Ct. 227; *United States v. Woody Fashions, Inc.*, 190 F. Supp. 709. See also *Blockburger v. United States*, 284 U. S. 299, 52 S. Ct. 180. Under the same evidence test as laid down in *Bertsch v. Snook*, (5th Cir. 1929), 36 F.2d 155, there was only one conspiracy here, if any.

When delimiting the conspiratorial relationship, Courts have taken a broad realistic view in recognizing the continuance of a single, dominant plan despite changes in

personnel, *Telman v. United States*, (10th Cir. 1933), 67 F.2d 716, cert. den., 292 U. S. 650 (1934); changes in location, *Martin v. United States*, (10th Cir. 1938), 100 F.2d 490, cert. den., 306 U. S. 649; and changes in methods of operation, *Nye & Nissen v. United States*, 1949, 336 U. S. 613.

The Appellant has the burden of showing that the prosecution rests on one unit of conduct and that double jeopardy or res-judicata is made when a finding of guilty and not guilty are returned on the same facts. *Sanchez v. United States*, (9th Cir., 1965), 341 F.2d 225. *Vins v. United States*, (5th Cir., 1964), 331 F.2d 390, cert. den., 85 S. Ct. 149. *Johnson v. Estelle*, (5th Cir. 1975), 506 F.2d 347.

CONCLUSION

For the reasons stated above the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

By: _____

THOMAS G. SHARPE, JR.
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Petition for Writ of Certiorari along with a copy of the opinion and order on rehearing was served on the 23rd day of November, 1976 by United States Mail to the following:

Solicitor General of the
United States of America
Department of Justice
Washington, D. C. 20530

THOMAS G. SHARPE, JR.

APPENDIX A

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

NO. 76-1811
Summary calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

ROBERTO GARZA-GARCIA,
Defendant-Appellant.

**Appeal from the United States District Court
for the Southern District of Texas**

(October 4, 1976)

Before AINSWORTH, CLARK and RONEY, Circuit Judges.

PER CURIAM:

We find no merit to appellant's contentions that his conviction should be reversed on the grounds that evidence of the chain of custody of the cocaine introduced at trial

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* Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409 Part I.

was not proved and that his acquittal on one conspiracy count in the indictment should have required the dismissal of a separate conspiracy count. It was within the trial court's discretion to determine the propriety of the chain of custody. Questions as to links in the chain of custody of contraband affect the weight to be given to the evidence and not its admissibility. United States v. Bates, 512 F.2d 56, 58-9 (5th Cir. 1975). As to appellant's second point, inconsistency between counts in a jury verdict is not a legitimate ground for attacking a conviction. An acquittal on one count does not undermine the validity of a conviction on another count. Hamling v. United States, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d (1974); United States v. Guajardo, 508 F.2d 1093 (5th Cir. 1975).

AFFIRMED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 76-1811

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ROBERTO GARZA-GARCIA,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING

(November 1, 1976)

Before AINSWORTH, CLARK and RONEY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ CHARLES CLARK
United States Circuit Judge